E COPY

FILED
SEP 27 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 72-249

OCTOBER TERM, 1972

THE CITY OF AKRON, OHIO,
Petitioner,

vs.

VILLAGE OF MIDDLEFIELD, *et al.*,
Respondents.

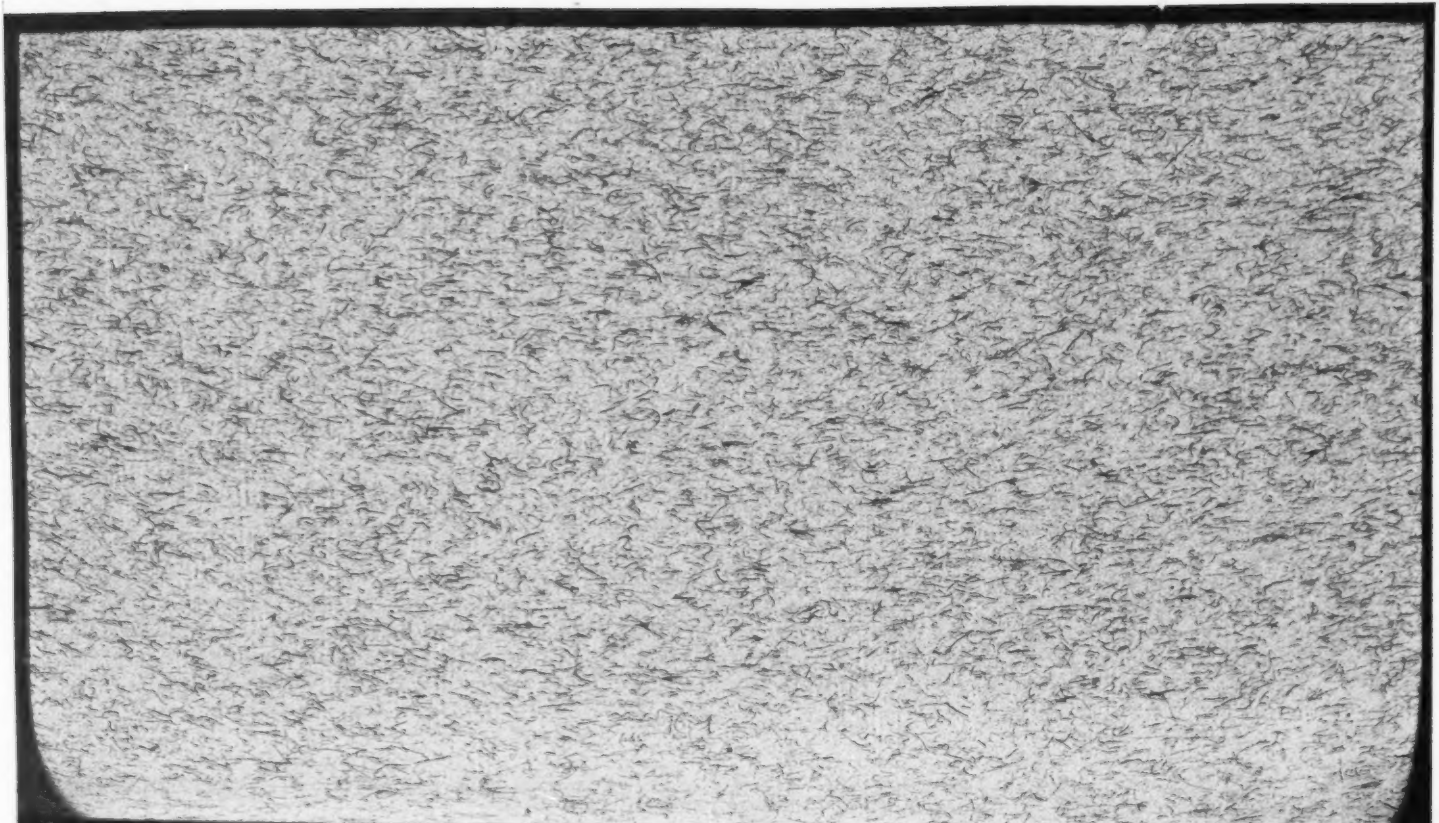
ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

GENE HENRY
Geauga County Prosecutor
213 Main Street
Chardon, Ohio 44024
(216) 286-7145
Attorney for Respondents

THRASHER, DINSMORE & DOLAN
By: LAWRENCE J. DOLAN
100 Center Street
Chardon, Ohio 44024
(216) 285-2242 or 942-1034
Of Counsel

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647



In the Supreme Court of the United States

No. 72-249

OCTOBER TERM, 1972

THE CITY OF AKRON, OHIO,
Petitioner,

vs.

VILLAGE OF MIDDLEFIELD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

ARGUMENT

The petitioner in the within matter sets out two constitutional issues, namely, Article I, Section 10: Impairment of Contract; and the 14th Amendment, Section I: Due Process.

It bases these positions on its argument that the courts of Ohio have denied it the right obtained by 1911 legislation by the Ohio State Legislature. It says this legislation and the rights conferred therein constitute a contract between itself and the State of Ohio.

Without taking issue with whether this legislation, in fact, amounts to a contract, it is the position of the respondents now, as it has been throughout this case, that the petitioner received no right to do anything outside the

County of Summit by reason of the 1911 legislation. This legislation in part reads as follows:

> . . . There is hereby granted to said city of Akron for the waterworks purposes as aforesaid the right to enter in and upon and occupy the lands of the state in said Summit county to develop additional storage either by the construction of new reservoirs or dams, or the enlargement of those already constructed by the state on said rivers . . . .
>
> (See page A32, paragraph 3 of Petitioner's Petition.)

The real property involved in this litigation is located in Geauga County.

The court of original jurisdiction, the Common Pleas Court of Trumbull County, in its written opinion relative to this claim of contract impairment and lack of due process, said as follows:

> . . . There was no special grant of any right to appropriate lands of any political subdivision outside of Summit County, and such a grant could not be implied from the circumstances of the case. To obtain this authority would require legislative action which heretofore has not been taken.
>
> (See page A18, paragraph 3 of Petitioner's Petition, line 7.)

The Eleventh District Court of Appeals, in its written opinion affirming the lower court's decision held as follows:

> . . . We hold that the 1911 grant did not give special power to the City of Akron to appropriate lands beyond Summit County so as to be able to reduce to possession certain waters. The grant of 1911 permits the City of Akron:
>
> a. The right to use certain waters
> b. The right to come upon these waters for the purpose of constructing reservoirs *in Summit County.*

Therefore, the City of Akron's right to appropriate outside its own territorial boundaries is only the same right as any municipality might have and is not expanded by the 1911 grant.

(See page A6, paragraphs 2 and 3 of Petitioner's Petition.)

Further, the petitioner in its petition made reference to *Sears, Trustee v. City of Akron,* 246 U.S. 242, stating on page 11 of its petition that the U.S. Supreme Court in this *Sears* case has already held the petitioner to be possessed of special property rights and stating further on page 13 that the Ohio courts have chosen to ignore the *Sears* case. This is not so.

The court of original jurisdiction in its ruling as referred to above, did make specific reference to the *Sears* case, as follows:

> In the case of *Sears v. City of Akron,* 246 U.S. 242, the Court had before it an action to enjoin construction of a reservoir under the 1911 legislation authorizing Akron to use the waters of the various rivers in the area, and in this case it was held that the plaintiff had no right to equitable remedy in the circumstances of this case. However, Justice Brandeis noted:
>
> "In May, 1911, the Legislature of Ohio granted to the city by special act the right to divert and use forever, for the purpose of its water supply, the Tuscarawas River, the Big Cuyahoga and Little Cuyahoga Rivers, and the Tributaries thereto now wholly or partly owned or controlled by the state, the city already possessing, under the general law of Ohio, power to appropriate for this purpose by condemnation proceedings the property of any private corporation. OGC 3677-3697."
>
> It would appear the Supreme Court did not regard the 1911 grant a special grant of any authority to appropriate inasmuch as the City of Akron already had the general power to appropriate. There is no specific

grant of authority to appropriate and considering that Akron did possess general appropriation authority, this Court cannot imply a grant or authority from the grant or water rights. Lacking any special authorization to appropriate, this Court concludes that the City of Akron has no right to appropriate lands of the Village of Burton or the Village of Middlefield.

(See Pages A17 and A18 of Petitioner's Petition.)

CONCLUSION

With regard to the 1911 grant, there was no constitutional question involved. The *Sears* case and the court of original jurisdiction and the Court of Appeals in this case correctly found the 1911 grant only applies to State-owned land in Summit County and has no application to lands in Geauga County. Upon appeal, the Supreme Court of Ohio refused jurisdiction.

Respectfully submitted,

GENE HENRY

Attorney for Respondents